



No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

VOLT INFORMATION SCIENCES, INC.,
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD
JUNIOR UNIVERSITY, Appellee.

ON APPEAL FROM THE
COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

APPENDICES TO
JURISDICTIONAL STATEMENT

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LIST OF CONTENTS

- Appendix A - Opinion and Judgment of the California Court of Appeal from Which This Appeal Is Taken
- Appendix B - Order of the California Supreme Court Denying Appellant's Petition for Review
- Appendix C - Order of the State Trial Court Denying Appellant's Petition to Compel Arbitration
- Appendix D - Appellant's Notice of Appeal
- Appendix E - Excerpts from Appellant's Brief in the State Trial Court
- Appendix F - Excerpts from Appellant's Opening Brief in the State Court of Appeal
- Appendix G - Excerpts from Appellant's Petition for Review in the California Supreme Court
- Appendix H - Relevant Statutes and Constitutional Provisions

APPENDIX A -

OPINION AND JUDGMENT OF
THE CALIFORNIA COURT OF APPEAL
FROM WHICH THIS APPEAL IS TAKEN

CERTIFIED FOR PUBLICATION

SEE DISSENTING OPINION

FILED
October 5, 1987
Richard J. Eyman,
Clerk

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES)	
OF LELAND STANFORD)	
JUNIOR UNIVERSITY,)	
Plaintiff-Respondent,	)	No. H002634
)	
vs.	)	(Santa Clara
	)	County Super.
VOLT INFORMATION	)	Court P48603)
SCIENCES, INC.,)	
Defendant-Appellant.)	
)	

The Board of Trustees of the Leland Stanford Junior University (Stanford) and Volt Information Sciences, Inc. (Volt) are parties to a written contract under which Volt was to construct a system of electrical conduits throughout the Stanford campus. The contract contains an agreement to arbitrate any disputes arising therefrom. It also contains this language: "The contract shall be governed by the law of the place where the project is

located."

A dispute developed regarding compensation for additional work. Volt submitted a claim which Stanford refused to pay; whereupon Volt served on Stanford a formal demand for arbitration of its claim. Approximately a week later Stanford filed suit in Superior Court. The complaint alleged fraud and breach of contract, inter alia, against Volt and in addition sought indemnity from two companies involved in the design and management of the project. Stanford did not have arbitration agreements with these two firms.

Volt then filed a petition to compel arbitration and to stay prosecution of the lawsuit. Stanford responded with a motion to stay the arbitration pursuant to the terms of Code of Civil Procedure section 1281.2, subdivision (c),¹ on the ground that a lawsuit was pending involving defendants not bound by

¹/ "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it (contd.)

the arbitration agreement. The court denied Volt's petition and granted Stanford's motion under authority of section 1281.2. Volt appeals from that ruling.

The parties agree that their contract involves interstate commerce, and that, generally, the Federal Arbitration Act (the FAA) governs contracts in interstate commerce. There is no provision in the FAA corresponding to Code of Civil Procedure section 1281.2, subdivision (c) which would allow a court to stay arbitration when third not subject to arbitration are involved in the dispute; thus it is apparent that were the federal rules to

(footnote contd.) determines that an agreement to arbitrate the controversy exists, unless it determines that: ... [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common question of law or fact. ... [¶] If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court ... (4) may stay arbitration pending the outcome of the court action or special proceeding."

apply, Volt's petition to compel arbitration would have to be granted. On the other hand, Stanford and Volt have agreed, as we interpret their choice of law provision, that the laws of California, of which section 1281.2 is certainly a part, are to govern their contract. It is Stanford's position that enforcement of the arbitration agreement in accordance with the chosen California rules of procedure does not create a conflict with the federal act, since the purpose of the Act was to ensure that private agreements to arbitrate are enforceable contracts. Moreover, application of the federal rules in this case would force the parties to arbitrate in a manner contrary to their agreement. On balance it is this last point we find persuasive. Accordingly we will affirm the trial court's ruling.

I.

We start with the well-established principle that the interpretation of a written agreement is a legal question unless the interpretation turns upon the credibility of extrinsic evidence. (Estate of Dodge (1971) 6

Cal.3d 311, 318.) There was no extrinsic evidence here and thus no issue of fact. Consequently we are not bound by the trial court's construction but must reach our own determination of the meaning of this provision. (Rooney v. Vermont Investment Corp. (1973) 10 Cal.3d 351, 372.) In this case we agree with the trial judge that by choosing "the law of the place where the project is located," the parties chose to be governed by California law.

The quoted words are a standard choice of law provision contained in an American Institute of Architects document entitled "General Conditions of the Contract for Construction,"² intended for use by contracting parties across the nation. It is therefore not remarkable that the particular site of the project in question is not named. We have no doubt that the word "place" was intended to mean the forum state. Courts in other states faced with this identical language have reached the same conclusion we do here. (Lane-Tahoe,

²/ AIA Document A201, § 7.1.1.

Inc. v. Kindred Construction Company (Nev. 1975) 536 P.2d 491, 493; Eric A. Calstrom Construction v. Independent Sch. Dist. (Minn. 1977) 256 N.W.2d 479, 483; Standard Co., etc. v. Elliott Const. Co., Inc. (La. 1978) 363 So.2d 671.) Likewise, in the California case of Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal.App.3d 251, handed down the year before the Stanford-Volt agreement was forged, parties to a construction contract agreed to be governed by the law of the construction site, which the court took to mean California.

We do not find reasonable Volt's interpretation that the "place" where the project is located be construed to mean not only the state of California but also the nation of the United States of America. The question whether the Federal Arbitration Act nonetheless applies by virtue of the fact that the contract is one in interstate commerce is another matter, to which we turn next.

II.

Volt argues even if the choice of law

provision is taken to mean that California law shall govern, the supremacy clause of the United States Constitution operates to preempt California law because the contract is in interstate commerce. The parties' choice of law insofar as it results in direct conflict with federal law under the provisions of the FAA would thus be rendered void and the federal rule would prevail.

We cannot countenance such a result. At the outset, it is by no means entirely clear that the parties cannot choose to arbitrate under the state rather than the federal statutory scheme. The court in Garden Grove considered this question. "The Federal Arbitration Act by its terms applies to all commercial agreements involving interstate commerce; thus, on the face of it, it would appear federal law controls. However, in this case the parties agreed by contract to be governed by the law of the construction site, California. While California courts have held the Federal Arbitration Act (FAA) applies to California cases involving contracts of

interstate commerce, we have not found any cases applying it where the parties committed to be governed by state law. In the face of such a choice of laws provision, California law applies unless preempted by the FAA." (Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., supra, 140 Cal.App.3d at p. 262.)

State law is preempted only to the extent that it stands as an obstacle to the accomplishment of the aims of the federal enactment. (Perez v. Campbell (1971) 402 U.S. 637, 644; Waysl, Inc. v. First Boston Corp. (9th Cir. 1987) 813 F.2d 1579.) The FAA was intended to "revers[e] centuries of judicial hostility to arbitration agreements." (Scherk v. Alberto-Culver Co. (1974) 417 U.S. 506, 510 [94 S.Ct. 2449, 2453].) The purpose behind its passage was "to ensure judicial enforcement of privately made agreements to arbitrate. ... The Act ... does not mandate the arbitration of all claims, but merely the enforcement - upon the motion of one of the parties - of privately made arbitration agreements. ... [I]ts purpose was to place an arbitration agreement 'upon the

same footing as other contracts, where it belongs,' ..." (Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213, 219 [105 S.Ct. 1238, 1242].)

Bearing this in mind there is little doubt that the FAA preempts state common law under which arbitration agreements are unenforceable. (See, e.g., Episcopal Housing Corp. v. Federal Ins. Co., (S.C. 1977) 239 S.E.2d 647.) It is equally apparent that state statutes which bar the enforcement of arbitration agreements in particular areas of the law must give way to the federal policy. Thus in two recent United States Supreme Court cases³ California's Franchise Investment Law (Corp. Code, § 31512), and Labor Code section 229, respectively, both of which allow for a judicial forum notwithstanding a valid arbitration agreement, were held to be preempted by the FAA.

It does not follow, however, that the

3/ Southland Corp. v. Keating 465 U.S. 1 (1984) and Perry v. Thomas (1987) 482 U.S. ___, [96 L.Ed.2d 426].

federal law has preclusive effect in a case where the parties have chosen in their agreement to abide by state rules. In fact it would appear that the federal law mandates enforcement of such an agreement according to its terms, since the recognized aim of the Act was to make arbitration agreements "as enforceable as other contracts." (Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, fn. 12.)

The thrust of the federal law is that arbitration is strictly a matter of contract. In this California law is entirely in accord: "Arbitration is ... a matter of contract, and the parties may freely delineate the area of its application." (O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482, 490.) Since "[t]he 'Act does not dictate that we should disregard parties' contractual agreements ... outlining the boundaries of the areas intended to be arbitrable'" (Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal.App.3d 632, 640), it follows that the parties are at liberty to choose the terms under which they will

arbitrate, and such a choice will not run afoul of the FAA. Stated another way, the Act does not operate to require the parties to submit to arbitration any dispute which they have not agreed so to submit. (AT&T Tech., Inc. v. Communications Workers (1986) ___ U.S. ___, ___, [106 S.Ct. 1415, 1418].)

If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the California rules of civil procedure governing arbitration agreements.

Were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law as expressed above, it also

violates basic principles of contract law. Since contractual terms are rarely agreed to without reason, it is assumed that no part of an agreement is superfluous or without effect, but that each term was bargained for. (Rest. Contracts 2d. § 203.) Where a party is deprived of a benefit of his bargain by the operation of law, that party is excused from his duty to perform. (Rest. Contracts §§ 458, 463, 464; 6 Corbin, Contracts (1962) Discharge by Failure of Consideration Either Existing or Prospective, § 1255; 1 Witkin, Summary of Cal. Law (8th ed.) Contracts, Frustration of Purpose § 612, Operation of Law § 607.) Thus even if we were to decide, which we do not, that federal law preempted here, Stanford would be entitled to raise this defense to further performance under the arbitration agreement.

III.

Shortly before oral argument in this matter the case of Liddington v. The Energy Group, Inc. (1987) 192 Cal.App.3d 1520 was decided by the First District. That case involved a service contract in interstate commerce

containing both an arbitration agreement and also a choice of law provision designating California to be the forum state. The contract further provided that the parties "'shall be deemed to have agreed to binding arbitration in the State of California ...'" (Id., at p. 1523, fn. 3.) When the Liddingtons were sued by a bank for default on a promissory note, they cross-complained against The Energy Group, assignee of the service contract, for failure to install energy systems financed by the bank. The Energy Group then filed a petition to compel arbitration pursuant to the arbitration clause. The trial court stayed arbitration pending the resolution of the litigation, on the basis of Code of Civil Procedure section 1281.2, subdivision (c). On appeal The Energy Group argued that Code of Civil Procedure section 1281.2 was preempted to the extent it was used to stay arbitration proceedings governed by the FAA. The Court of Appeal agreed and reversed.

Despite the striking similarity between this case and ours, we conclude that the

precise question before us was not decided in Liddington. The analysis in Liddington approached the preemption issue from the standpoint of whether the state law in question was a general principle applicable to all contracts, or a rule pertaining exclusively to arbitration contracts. If it was the latter, it would be preempted by the rules contained in the FAA to the extent that they conflicted. In reaching its decision that section 1281.2 fell into this category, the Liddington court relied upon a footnote in the United States Supreme Court case of Perry v. Thomas, supra, 482 U.S. ___, ___ [96 L.Ed.2d 426, 437] decided only two weeks earlier. In footnote nine in that case the court said this: "Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement"

In Perry the court was faced on the one hand with a private agreement to arbitrate according to state law, and on the other with a state law expressly providing for a judicial forum in spite of the arbitration agreement. State policy was therefore directly at loggerheads with the purposes behind the FAA, and the federal law prevailed to enforce the private agreement. In our case the issue is not whether the state law is one directly affecting the enforceability of arbitration agreements, but rather whether the federal rules can be applied to compel parties to arbitrate contrary to the choice of law in their agreement. Neither Perry nor Liddington addresses this question.

Nor do we find the cases of Moses H. Cone Hospital v. Mercury Constr. Corp. (1983) 460 U.S. 1 [103 S.Ct. 927] or Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213 [105 S.Ct. 1238], relied upon by Volt, to be on point here. Both of these cases arose in the context of competing claims in federal and state courts. Neither concerned the enforceability

of a contractual choice of law provision.

IV.

As an additional ground for appeal Volt contends that even if California law were to apply, section 1281.2, subdivision (c) cannot be construed to authorize a stay under the circumstances presented here. Volt argues that application of the statute where Stanford has brought the separate action as a "reactive" response to the demand for arbitration, would amount to giving license to a party to avoid its obligations under an arbitration agreement by simply filing a lawsuit against the party seeking arbitration and joining others not part of the agreement.

As Volt concedes, the language of section 1281.2 is sufficiently broad to encompass the present procedural posture. Moreover the statute does not provide for a stay in every case in which the moving party has filed a separate lawsuit, but rather gives the court discretion to make such a ruling in an appropriate case.

It is well known that a court of review

will not reverse a discretionary ruling in the absence of a clear abuse of discretion.

(Barajas v. USA Petroleum Corp. (1986) 184 Cal.App.3d 974, 989.)

The guidelines for the exercise of discretion here are set forth in the statute itself. The court may grant the stay if it determines that there is a pending court action involving a third party "arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings of law or fact."

Volt claims there is no evidence establishing common issues of law or fact since its demand for arbitration concerned a claim for payment of additional compensation against Stanford alone. In the body of the demand, however, Volt has stated that the changes and additional work it was required to perform were due to a "defective and unsuitable" design and "improper contract administration." Volt does not dispute that the two companies named by Stanford in its complaint were instrumental in the design and management of the project.

Stanford has not merely asserted ancillary claims against unnamed Does in its lawsuit, as was the case in Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal.App.3d 99. In that case the court found that this was insufficient to show a third party claim which would create "a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc., § 1281.2, subd. (c).) Rather Stanford has named two parties both closely involved in the management and design of the project, who conceivably could play a role in the present dispute. The possibility of conflicting rulings is readily apparent. Under the circumstances we need go no further than to say we find no abuse of discretion.

The order of the trial court is affirmed.

Brauer, J.

I concur:

Agliano, P.J.

CAPACCIOLI, J., dissenting:

I respectfully dissent. I find that the majority's analysis is flawed because it is based upon an erroneous premise, namely that the parties chose California arbitration law over federal law by agreeing that the contract would be "... governed by the law of the place where the project is located."

Analytically, it makes no difference in this case whether California and the United States or California alone is the "place." There can be no conflict between federal and state law because a state law is void to the extent it conflicts with federal law under the Supremacy Clause of the United States Constitution and all the states in our republic are bound by the same federal law. (U.S. Const., art. 6, cl. 2; Maryland v. Louisiana (1981) 451 U.S. 725, 746-47 [68 L.Ed.2d 576, 595-96]; Perez v. Campbell (1971) 402 U.S. 637, 649 [29 L.Ed.2d 233, 242].) The Supremacy Clause of the United States Constitution provides: "The Constitution, and the Laws of

the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. 6, cl. 2.)

California's Constitution as well as the U.S. Constitution establishes that federal law is paramount: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." (Cal. Const., art. 3, § 1.) Furthermore, the California Supreme Court has held that the California courts have a nondiscretionary duty to enforce federal law where they have concurrent jurisdiction. (Gerry of California v. Superior Court (1948) 32 Cal.2d 119, 122; Brown v. Pitchess (1975) 13 Cal.3d 518, 523.) Thus, under California law, federal law governs matters cognizable in California upon which the United States has definitively spoken.

Thus, the parties' choice of law provision,

even assuming arguendo that it must be interpreted as an agreement to have California law govern, does not invariably lead to the conclusion that federal law is inapplicable. To the contrary, where federal law is supreme, California law mandates that federal law controls.

The Federal Arbitration Act requires state and federal courts to enforce any arbitration agreement contained in a contract "evidencing a transaction involving commerce" "... save upon such grounds as exist at law in equity for the revocation of any contract." (See 9 U.S.C., § 2; see Perry v. Thomas (1987) 482 U.S. ____ [96 L.Ed.2d 426, 435-37]; Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213, 215-17 [84 L.Ed.2d 158, 161-63, 165]; Southland Corp. v. Keating (1984) 465 U.S. 1, 10-16 [79 L.Ed.2d 1, 12-16].) To the extent California law permits a court to deny or stay arbitration in the face of an unqualified agreement to arbitrate, that law is preempted by the Federal Arbitration Act where a contract "evidencing a transaction involving commerce" is concerned. (Liddington

v. The Energy Group, Inc. (1987) 192 Cal.App.3d 1520, 1525-29; see Perez v. Campbell, supra, 402 U.S. at pp. 644, 649 [29 L.Ed.2d 233, 239, 244]; cf. Perry v. Thomas, supra; Southland Corp. v. Keating, supra.)

While I agree with the majority that the Federal Arbitration Act does not preclude parties from contractually limiting the scope of their arbitration agreement (see Seaboard Coast Line R. Co. v. Trailer Train Co. (1982) 690 F.2d 1343, 1348, 1352; Davis v. Chevy Chase Financial Ltd. (1981) 667 F.2d 160, 165; Alabama Ed. Ass'n. v. Alabama Prof. Staff Organ. (1981) 655 F.2d 607; Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal.App.3d 190, 195; cf. United Steelworkers v. Warrior & Gulf Co. (1960) 363 U.S. 574 [4 L.Ed.2d 1409]), the mere choice of California law is not a selection of California law over federal law and does not in any way limit an otherwise unqualified agreement to arbitrate.

The majority concedes that Volt's petition to compel arbitration would have to be granted if the federal law applied. I think there is

no doubt that it does.

I would reverse and remand.

Capaccioli, J.

APPENDIX B -

ORDER OF THE CALIFORNIA
SUPREME COURT DENYING
APPELLANT'S PETITION FOR REVIEW

FILED
Dec. 17, 1987
Lawrence P. Gill,
Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H002634

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

BOARD OF TRUSTEES OF THE
LELAND STANFORD JUNIOR UNIVERSITY, Respondent

v.

VOLT INFORM. SCIENCES, INC., Appellant

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed October 5, 1987, which appears at 195 Cal.App.3d 349. (Cal. Const., Art. VI, sec. 14; Rule 976, Cal. Rules of Court.)

/s/ Malcolm Lucas
Chief Justice

APPENDIX C -

ORDER OF THE STATE TRIAL
COURT DENYING APPELLANT'S
PETITION TO COMPEL ARBITRATION

FILED
Nov. 21, 1986
Grace Yamakawa
County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

BOARD OF TRUSTEES OF THE LELAND)
STANFORD JUNIOR UNIVERSITY, a)
body having corporate powers,)

Plaintiff,)

v.)

VOLT INFORMATIONS SCIENCES,)
INC., TELECOMMUNICATIONS)
INTERNATIONAL, INC., BRIAN-)
KANGAS-FOULK & ASSOCIATES, and)
DOES I through XX, inclusive,)

Defendants.)

No. P48603

ORDER

Plaintiff's motion to stay arbitration is granted and defendant's motion to compel arbitration is denied. The court believes that the principals [sic] enunciated in Garden Grove Community Church vs. Pittsburgh-Des Moines Steel Co., 140 Cal.App.3d 251 and Prestressed Concrete, Inc. v. Adolphson & Peterson, Inc., 240 N.W.2d 551, as well as California Code of

Civil Procedure §1281.2(c) apply in this case.

DATED: November 21, 1986

/s/ Charles Gordon
CHARLES GORDON
Judge of the Superior Court

APPENDIX D -

APPELLANT'S
NOTICE OF APPEAL

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FILED
Jan. 14, 1988
Richard J. Eyman
Clerk

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COURT OF APPEAL OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES)
OF LELAND STANFORD)
JUNIOR UNIVERSITY,)

Plaintiff-Respondent)

vs.)

VOLT INFORMATION)
SCIENCES, INC.)

Defendant-Appellant.)
_____)

No. H002634

NOTICE OF APPEAL
TO THE SUPREME
COURT OF THE
UNITED STATES

On Appeal from the Superior Court
for the County of Santa Clara,
Honorable Charles Gordon, Presiding

This court having rendered its decision and
judgment herein on October 5, 1987, affirming
the order of the trial court denying appel-
lant's petition to compel arbitration, and the

Supreme Court of California having entered its order herein on December 17, 1987, denying appellant's petition for review, appellant Volt Information Sciences, Inc., hereby appeals to the Supreme Court of the United States, pursuant to the provisions of section 1257(2) of Title 28 of the United States Code, from the aforesaid decision and judgment of this court entered herein on October 5, 1987.

Dated: January 11, 1988

Respectfully submitted,

PETTIT & MARTIN

By /s/ James Harrington
Attorneys for Appellant

APPENDIX E -
EXCERPTS FROM
APPELLANT'S BRIEF
IN THE STATE TRIAL COURT

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FILED
 October 30, 198
 Grace Yamakawa,
 County Clerk

Attorneys for Defendant
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
 FOR THE COUNTY OF SANTA CLARA

THE BOARD OF TRUSTEES)	No. P 48603
OF THE LELAND STANFORD)	
JUNIOR UNIVERSITY, a body)		MEMORANDUM OF
having corporate powers,	)	POINTS AND
	)	AUTHORITIES IN
Plaintiff,	)	OPPOSITION TO
	)	PLAINTIFF'S
vs.	)	MOTION TO STAY
	)	ARIBITRATION
VOLT INFORMATION	)	AND IN SUPPORT
SCIENCES, INC.,	)	OF DEFENDANT'S
TELECOMMUNICATIONS	)	VOLT INFORMATION
INTERNATIONAL, INC.	)	SCIENCES INC.'S
BRIAN-KANGAS-FOULK &	)	PETITION TO
ASSOCIATES, and DOES I	)	<u>COMPEL ARBITRATION</u>
through XX, inclusive,)	
)	
Defendants.)	
)	

Defendant Volt Information Sciences,
 Inc. ("Volt") submits the following Memorandum
 of Points and Authorities In Opposition to

Plaintiff's Motion To Stay Arbitration and In Support of Volt's Petition to Compel Arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., and the California Arbitration Act, Code of Civil Procedure, Section 1280, et seq.

* * * *

II. THE FEDERAL ARBITRATION ACT IS APPLICABLE TO ANY CONTRACT INVOLVING INTERSTATE COMMERCE, NOTWITHSTANDING A CHOICE OF LAW PROVISION WITHIN THE CONTRACT AND, THEREFORE, THE ISSUE OF WHETHER TO COMPEL ARBITRATION MUST BE DECIDED ACCORDING TO THE FEDERAL ARBITRATION ACT

The FAA applies to any contract involving interstate commerce. 9 U.S.C. Section 2. It is clear, and Stanford does not contest, that the contract for the construction of the Distribution Conduit System involves interstate commerce. (See Affidavit of Eugene F. Curran.) Rather, Stanford contends that the choice of law provision within the contract somehow nullifies the application of the FAA and requires the Court to rely on California law. In so contending, however, Stanford

ignores one of the most fundamental concepts in American law.

A. THE FEDERAL ARBITRATION ACT IS THE SUPREME LAW OF THE LAND

It is well settled that Congress has the authority to regulate interstate commerce under the Commerce Clause of the United States Constitution. Gibbons v. Ogden. 22 U.S. 1, 196 (1824). The FAA rests on the authority of Congress to enact substantive rules under the Commerce Clause.

In the leading case of Prima Paint Corp. v. Flood and Conklin, 388 U.S. 395 (1967), a federal district court applied federal substantive law in determining whether an arbitration agreement had been fraudulently induced. The United States Supreme Court, in considering whether the district court's holding was constitutionally permissible under the Erie Doctrine (Erie R.R. Co v. Tompkins, 304 U.S. 64 (1938)) stated:

The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. [citation.] Rather, the

question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has the power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.

Prima Paint at 405.

Whereas the court in Prima Paint did not specifically address a choice of law clause, it plainly implied that the substantive law of the FAA was applicable both in federal and state courts. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), the United States Supreme Court reaffirmed the Prima Paint holding that the FAA created a substantive body of law and expressly held that the FAA was applicable in state courts as well as federal courts. Id. at 24.

Moreover, in Southland Corp. v. Keating, ____ U.S. ____, 104 S.Ct. 852 (1984), the Supreme Court held that the FAA applied to any arbitration provision in a contract evidencing interstate commerce. The Court

ruled that state courts are required to apply the FAA, and to the extent state law conflicts with the FAA, it is preempted under the Supremacy Clause in Article VI of the United States Constitution. In so ruling the United States Supreme Court overruled the California Supreme Court's holding in Keating v. Southland Corp., 31 Cal.3d 584 (1982).

In Keating v. Southland Corp., plaintiff, the franchisee of a 7-Eleven convenience store, sued Southland Corp. ("Southland"), the owner and franchiser of the stores, for various violations of the California Franchise Investment Law, Corporations Code Section 31000, et seq. Pursuant to an arbitration provision in all franchise contracts, Southland sought arbitration of plaintiff's claims according to the provisions of the FAA. The California court ruled that arbitration of the claims was precluded by Corporations Code Section 31512, which states that contractual provisions waiving application of the California franchise law are void. The California court went on to

state that the strong policy to protect California franchisees, as evidenced by Corporations Code Section 31512 did not conflict with the principles of arbitration embodied in the FAA.

The United States Supreme Court expressly overruled the California Supreme Court's holding. Writing for the majority, Chief Justice Burger stated:

In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. Southland Corp. v. Keating, supra, _____ U.S. _____, 104 S.Ct. at 861.

To the extent that any California law could be interpreted as preventing enforcement of or interfering with the arbitration agreement, it violated the Supremacy Clause and is null and void. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra, 460 U.S. 1, 24.

B. INSERTION OF A CHOICE OF LAW PROVISION DOES NOT AFFECT THE APPLICABILITY OF THE FAA

Once it has been determined that a contract involves interstate commerce, the FAA will apply notwithstanding the insertion of a choice of law provision in the contract. Commonwealth Edison Co. v. The Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1973). In Commonwealth, the parties included both an arbitration provision and a choice of law provision in their contract. After defendant terminated the contract, plaintiff sought to compel defendant to arbitrate controversies related to that termination. The district court refused to apply state law and ordered defendant to arbitration. The court of appeals affirmed the district court and held that notwithstanding the inclusion of a choice of law provision, the FAA rather than state law governs any arbitration contract involving interstate commerce. The court stated:

Congress, in enacting the Federal Arbitration Act, exercised its power over admiralty and interstate commerce. Any arbitration contract involving one of those areas is governed by the Federal Act. To permit the parties to contract away the application of the Act by adopting state law to govern their

agreement would be inconsistent with the Act itself and the holding in Prima Paint. Id. at 1269.

Since the FAA applies in state courts as well as federal, it requires state courts to enforce the arbitration agreement despite contrary state law or policy. R.J. Palmer Construction Co., Inc. v. Wichita Band Instrument Co., Inc., 642 P.2d 127 (Kan. 1982), Allison v. Medicab Intern, Inc., 597 P.2d 380 (Wash. 1979), Communications Workers of America v. Pacific Telephone & Telegraph Co., 462 F.Supp. 736 (C.D. Cal. 1978) Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 67 Cal.App.3d 19 (1977).

Stanford relies on Garden Grove Community Church v. Pittsburg-Des Moines Steel Co., 140 Cal.App.3d 251 (1983) as support for its contention that by inserting a choice of law provision in the contract, the FAA cannot apply. Stanford's analysis of this case is misleading and incomplete.

In Garden Grove, the parties agreed to be governed by the law of the construction site, in this case California. The Court stated:

While California courts have held the FAA applies to California cases involving contracts of interstate commerce, we have not found any cases applying it where the parties committed to be governed by state law. In the face of such a choice of law provision, California law applies unless preempted by the FAA.
[Emphasis added.]

Id. at 262.

The Court in Garden Grove was addressing the issue of consolidating several arbitrations into one arbitration. On this specific issue, the FAA and the California Arbitration Act are substantially similar. The Court recognized this. Therefore, the Court held that on the consolidation issue, the FAA neither preempted nor conflicted with the equivalent California statute.

The provisions of California Code of Civil Procedure Section 1281.2(c), however, directly conflict with the principles embodied in the FAA. Section 1281.2(c) states that a

court need not compel arbitration if a party to an arbitration agreement is also a party to a pending lawsuit with a third party and there is a possibility of conflicting rulings. This provision is completely contradictory to case law interpreting the FAA. Under the FAA, arbitration must be compelled even in the presence of third party defendants. As the United States Supreme Court held in Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238 (1985):

The act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the results would be the possibly inefficient maintenance of separate proceedings in different forums. [Emphasis added.]

Id. at 1241.

Moreover, the Garden Grove decision contains no discussion whatsoever of federal preemption principles and the court cites no authority for reaching its conclusion. Garden Grove was decided prior to the United States Supreme Court's holdings in Moses M. Cone Memorial Hospital v. Mercury Construction Corp., supra, 460 U.S. 1 and Southland Corp. v.

Keating, supra, ____ U.S. ____, 104 S.Ct. 852. Clearly, then, Garden Grove has been explicitly overruled.

Finally, Paragraph 7.1.1 of the General Conditions does not specifically state California law will apply. It states the law of the place shall apply. In this case, the applicable law of the place is federal. California courts have long recognized that where federal law is supreme, they are required to apply that federal law.

III. UNDER THE PRINCIPLES EMBODIED IN THE
FEDERAL ARBITRATION ACT, THE COURT
MUST ENFORCE THE ARBITRATION
PROVISION

The Supreme Court's holding in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra. 460 U.S. 1, was based on facts almost identical to those in the present case.

In Moses H. Cone, the hospital entered into a contract with Mercury Construction Corp. ("Mercury") for the construction of an additional hospital wing. The hospital drafted and inserted in the

contract an arbitration provision, the terms of which are nearly identical to the language in the arbitration provision drafted by Stanford here. The hospital did not include an arbitration provision in its separate contract with the architect for the project. A dispute arose regarding Mercury's claim for additional compensation due to the hospital's errors and omissions during the course of construction. The same day Mercury filed a Demand for Arbitration, the Hospital filed and served a complaint, naming both Mercury and the architect as defendants. The hospital's claim against the architect was for declaratory relief of entitlement to indemnity should the hospital be found liable to Mercury. The hospital claimed the dispute could not go to arbitration because the architect could not be compelled to participate, and this would necessarily result in piecemeal litigation. The Supreme Court held:

It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That

misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Id. at 20. [Emphasis added.]

The Court ordered the parties to arbitration.

The Supreme Court's clear holding that arbitration agreements must be enforced even if this results in piecemeal litigation has been emphatically endorsed by subsequent decisions. In Southland Corp. v. Keating, supra, ____ U.S. ____, 104 S.Ct. 852 the court held that

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. Id. at 856.

And, in Dean Witter Reynolds, Inc. v. Byrd, supra, ____ U.S. ____, 105 S.Ct. 1238, the court emphasized the mandatory nature of the court's obligation to enforce arbitration even if it results in the "possibly inefficient

maintenance of separate proceedings in different forums." Id. at 1241.

The plain mandate from the United States Supreme Court is that the FAA applies to all contracts arising out of interstate commerce. Under the FAA, a court is required to enforce an arbitration agreement even if this results in piecemeal litigation.

Significantly, in its opposition to Volt's Petition, Stanford has not even attempted to discuss, much less dispute, the Supreme Court's decrees in *Moses H. Cone, Southland Corp.* and *Dean Witter*. Any such attempt would, if made, of course be futile.

IV. EVEN IF FEDERAL LAW DID NOT APPLY,
CALIFORNIA LAW OVERWHELMINGLY SUPPORTS
ARBITRATION OF THIS DISPUTE

* * * *

VI. CONCLUSION

Under both the Federal Arbitration Act and the California Arbitration Act, the Court is required to enforce valid arbitration agreements. Such an arbitration agreement is present in this case. The fact that Stanford has chosen to pursue additional claims against

third party defendants does not affect the arbitrability of the dispute between Stanford and Volt. Consequently, the Court should compel Stanford to arbitrate its dispute with Volt and stay the action pending the outcome of the arbitration.

DATED: October 30, 1986.

PETTIT & MARTIN

BY: _____

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APPENDIX F -

EXCERPTS FROM APPELLANT'S
OPENING BRIEF IN THE
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COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES)
OF LELAND STANFORD)
JUNIOR UNIVERSITY,)
Plaintiff-Respondent,)

vs.)

VOLT INFORMATION)
SCIENCES, INC.,)
Defendant-Appellant.)

No. H002634

Appeal from the Superior Court
for the County of Santa Clara
Honorable Charles Gordon, Judge

OPENING BRIEF
OF DEFENDANT AND APPELLANT
VOLT INFORMATION SCIENCES, INC.

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	2
ARGUMENT	6
I. Certain Basic Propositions Are Beyond Controversy - Namely, (1) That the Federal Arbitration Act Generally Governs the Arbitra- bility of All Disputes Involving Interstate Commerce and to That Extent Preempts Any Conflicting Provisions of State Law, (2) That the Present Dispute Involves Inter- state Commerce and Would Therefore Be Governed by the Federal Arbitra- tion Act in the Absence of a Valid Choice-of-Law Clause in the Parties' Contract Specifying Some Other Body of Law to Govern Application of Their Agreement, and (3) That Application of the Federal Arbitration Act to This Case Would Require Reversal of the Superior Court's Order.	6
A. The General Coverage of the Federal Arbitration Act	6
B. The Applicability of the Act to This Case	8
C. The Result That Would Be Dictated by the Act	10
D. Conclusion	14
II. For Each of Three Independently Sufficient Reasons, the Clause of the Parties' Contract Specifying That It "Shall Be Governed by the Law of the Place Where the Project Is Located" Must Be Interpreted to Permit, Indeed to Require, Resolu- tion of This Controversy in Exclu-	15

sive Accordance with the Dictates of the Federal Arbitration Act.

A. The Literal Terms of the Contractual Provision	15
B. The Dictates of Federalism	18
C. The Legal Invalidity of a Contrary Interpretation	21
D. The Two Decisions Espousing a Minority View	22
E. Conclusion	25
III. In Any Event, Even if This Controversy Were to Be Resolved In Accordance With State Law, Reversal of the Superior Court's Order Would Still Be Required Because C.C.P. §1281.2(c) Does Not Authorize the Type of Stay Order Entered by the Court in the Circumstances Presented Here.	25

CONCLUSION	37
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INTRODUCTION

This is an appeal, pursuant to C.C.P. §1294(a), from an order of the superior court denying appellant's petition to compel arbitration of a dispute between the parties pursuant to the terms of an arbitration clause in their agreement. By the same order, the court granted a cross-motion by respondent to stay any such arbitration pending the outcome of a law suit that had been commenced by respondent against appellant and certain third persons arising out of the same transaction that was the subject of the arbitration. The court's order was entered pursuant to C.C.P. §1281.2(c), which permits a superior court, under certain conditions, to deny a petition to compel arbitration or to stay a pending arbitration when the dispute sought to be arbitrated is the subject of pending litigation between the parties in which claims are also asserted against third persons who are not parties to the arbitration agreement.

The primary issue presented by this appeal is whether the provisions of C.C.P. §1281.2(c)

have any application whatever to the present controversy, or whether, on the other hand, the question of arbitrability of this interstate contract dispute should have been determined by exclusive reference to the terms of the Federal Arbitration Act, 9 U.S.C. §§1 et seq., which have been specifically held to require arbitration and to preclude entry of a stay order under precisely the conditions that are presented here. The superior court's refusal to apply the federal statute in this case was apparently based on a clause in the parties' contract providing that "[t]he Contract shall be governed by the law of the place where the project is located," which the court evidently interpreted to require resolution of the issue of arbitrability solely in accordance with California statutory law. Appellant contends that the court erred in this regard, because the term "the law of the place where the project is located" must be construed to include, not only California law, but also the laws of the United States, including the Federal Arbitration Act and the Supremacy

Clause of the United States Constitution. Alternatively, appellant contends that, even if California law were to be applied here, reversal of the court's order would still be required because, under a proper construction of C.C.P. §1281.2(c), that statute would not afford any justification for the entry of an order staying the arbitration in the particular circumstances of this case.

ARGUMENT

I. Certain Basic Propositions Are Beyond Controversy - Namely, (1) That the Federal Arbitration Act Generally Governs the Arbitrability of All Disputes Involving Interstate Commerce and to That Extent Preempts Any Conflicting Provisions of State Law, (2) That the Present Dispute Involves Interstate Commerce and Would Therefore Be Governed by the Federal Arbitration Act in the Absence of a Valid Choice-of-Law Clause in the Parties' Contract Specifying Some Other Body of Law to Govern Application of Their Agreement, and (3) That Application of the Federal Arbitration Act to This Case Would Require Reversal of the Superior Court's Order.

A. The General Coverage of the Federal Arbitration Act

Section 2 of the Federal Arbitration Act states that the Act governs the application and

enforcement of any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. §2. The term "commerce" is earlier defined to mean "commerce among the several states." Id. §1. The Act then goes on to declare the validity and enforceability of all such arbitration provisions and to prescribe certain procedures for their enforcement by the courts. Id. §§2-4. Although some of the remedial provisions of the Act refer to actions brought in the federal district courts (id. §4), it has now become well settled that the Act was intended to create a comprehensive body of substantive law governing all arbitrations arising out of interstate transactions, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S.

1, 24, 26 (1983); Communication Workers of Amer. v. Pac. Tel. & Tel. Co., 462 F.Supp. 736, 739 (C.D.Cal. 1978); Ford v. Shearson Lehman Amer. Express, Inc., 180 Cal.App.3d 1011, 1017-18 (1986); Lewis v. Prudential Bache Securities, Inc., 179 Cal.App.3d 935, 941 (1986); *** As the United States Supreme Court recently stated in its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, the Act "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act ... [which] governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24. The principles thus summarized by the Court are by now quite familiar and uncontroversial, and apparently are not disputed by Stanford in this case (see JA 225-27)

B. The Applicability of the Act to This Case

Equally beyond dispute is the proposition that the arbitration agreement at issue in this

case "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the Federal Arbitration Act, and that it therefore falls within the overall coverage of the Act. 9 U.S.C. §§1-2. Volt established by an uncontradicted affidavit in the court below that all of its supervisory personnel and much of its work force for the Stanford project were transferred to California from other states for the exclusive purpose of participating in that project, that a large proportion of the equipment and material used on the project was shipped from other states, and that overall administration of the project was conducted from Volt's offices outside California (JA 207-8). Under the standards enunciated in numerous prior decisions on this issue, these facts clearly establish a sufficient nexus with interstate commerce to bring this transaction well within the scope of the federal Act. E.g., Prima Paint Corp. v. Flood & Conklin, supra, 388 U.S. at 401; Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243 (5th Cir. 1986);

In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); *** It follows that, in the absence of a valid choice-of-law provision in the parties' contract selecting some other body of law to govern the application of their agreement, the question of arbitrability of the present dispute would have to be resolved in exclusive accordance with federal law. Once again, this conclusion is apparently not seriously questioned by Stanford (see JA 225-27).

C. The Result That Would Be Dictated by the Act

Finally, there is no disagreement that, if federal law does indeed govern the resolution of this controversy, its application will necessarily require reversal of the order of the superior court denying Volt's petition to compel arbitration and granting Stanford's motion to stay the arbitration pending the judicial resolution of its claims against the project designers. As noted earlier, the sole basis of the court's order was the provision of

C.C.P. §1281.2(c) that authorizes a stay of arbitration where non-arbitrable claims arising out of the same transaction have been asserted against third parties in a pending law suit. The Federal Arbitration Act contains no counterpart provision authorizing a stay of arbitration in these circumstances, and, indeed, the decisions applying the Act have repeatedly held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying enforcement of an otherwise valid arbitration agreement or for delaying the commencement of arbitration of an otherwise ripe dispute between the parties to the agreement. E.g., Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 20; C. Itoh & Co. (America), Inc. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975); *** See Dean Witter Reynolds, Inc. v. Byrd, ___ U.S. ___, 105 S.Ct. 1238, 1242-43 (1985). *** Since this settled federal rule would directly preempt the contrary prescription of C.C.P. §1281.2(c), and

would thus invalidate the stay order entered by the superior court in reliance upon that statute in this case, it necessarily follows that reversal of the court's order will be required if and to the extent that the Federal Arbitration Act is found to govern the disposition of this case. Stanford, once again, has not disputed this conclusion (see JA 225-27, RT 20-22).

D. Conclusion

It has thus been demonstrated (1) that the Federal Arbitration Act governs the enforcement of all arbitration agreements covered by its terms in both state and federal courts, and to that extent preempts any state laws that prescribe any different method of enforcement, (2) that the agreement at issue in this case falls within the scope of the Act and would therefore be governed by the terms of the Act in the absence of a valid choice-of-law clause in the parties' contract prescribing some other body of law to govern the application of their agreement, and (3) that, if the disposition of

the present case is indeed governed by the Federal Arbitration Act, the superior court's order staying the arbitration of Volt's dispute with Stanford will have to be reversed, because the Act precludes the entry of such a stay order in the circumstances presented here. All of these propositions are free from any genuine dispute. Thus, the only remaining issue that needs to be addressed - and the only issue that has been seriously contested by Stanford - is whether the clause in the parties' agreement specifying that "[t]he Contract shall be governed by the law of the place where the project is located" effectively precludes the application of federal law to this case and hence permitted the superior court to resolve the controversy in exclusive accordance with California statutory law and in disregard of the dictates of the Federal Arbitration Act. That issue is discussed in the next section.

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II. For Each of Three Independently Sufficient Reasons, the Clause of the Parties' Contract Specifying That It "Shall Be Governed by the Law of the Place Where the Project Is Located" Must Be Interpreted to Permit, Indeed to Require, Resolution of This Controversy in Exclusive Accordance with the Dictates of the Federal Arbitration Act.

As recited earlier, the provision of the parties' contract requiring its application in accordance with "the law of the place where the project is located" was apparently interpreted by the superior court as an exclusive reference to California statutory law and as a consequent mandate to ignore the prescriptions of the Federal Arbitration Act in ruling upon Volt's petition and Stanford's motion to stay the arbitration (RT 13-14; JA 252-53). As will now be demonstrated, this interpretation of the quoted provision of the contract was erroneous. For at least three independently sufficient reasons, each of which is supported by ample authority, the contractual reference to "the law of the place where the project is located" must be deemed to include federal law as well as California law and hence to require resolution of this dispute in accordance with

the otherwise clearly applicable terms of the Federal Arbitration Act.

A. The Literal Terms of the Contractual Provision

This conclusion is dictated, first of all, by the literal language of the contractual provision itself. The words, "the place where the project is located," literally refer, not only to the State of California, but also to the City of Palo Alto, the County of Santa Clara, and the nation of the United States of America. All of these political entities have laws, ordinances, and constitutional provisions that were applicable in one way or another to the activities occurring during the performance of the parties' contract. The literal words of the contractual provision therefore afford no basis whatsoever for choosing the laws of only one of these entities, to the exclusion of all of the others, as constituting "the law of the place where the project is located." To the contrary, the only literally proper interpretation of that phrase is that it refers collectively to all of the laws of all these

political entities within whose boundaries the project site was situated. Under that interpretation, the term encompasses, not only the statutory law of California, but also the statutes of the United States, including the Federal Arbitration Act. Moreover, it encompasses the Supremacy Clause of the United States Constitution, which generally dictates that federal law takes precedence over state law in the event of overlapping coverage of the same subject matter, and which specifically dictates that the Federal Arbitration Act preempts any state law, including C.C.P. §1281.2(c), that purports to impose restrictions on the enforcement of arbitration agreements of a kind not authorized by the federal Act. See cases cited at page 7, supra. The conclusion is unavoidable that, by its clear literal terms, the contractual provision mandating application of the contract in accordance with "the law of the place where the project is located," not only does not preclude, but specifically compels reliance upon the Federal Arbitration Act to determine

the arbitrability of disputes arising under the agreement at issue in this case, and that the trial court's ruling to the contrary was erroneous.

B. The Dictates of Federalism

Secondly, the same result would follow even if the choice-of-law clause in the agreement at issue here had explicitly and exclusively adopted "the law of California," rather than merely "the law of the place where the project is located," to govern the application of its provisions. For it is basic to the nature of our federal union, and inherent in the notion of federal primacy expressed in the Supremacy Clause, that the law of California, as of every other state, includes the laws of the United States, and that every federal enactment, in that sense, constitutes a law of each state to the same extent as if it had been passed by the state's own legislature. See *The Federalist*, Nos. 16, 27. This fundamental tenet of American federalism has found frequent expression in the opinions of the Supreme

Courts of both the United States and of California. E.g., Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Act Cases), 223 U.S. 1, 57-58 (1912); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876); Gerry of California v. Superior Court, 32 Cal.2d 119, 122 (1948); Estate of Lundquist, 25 Cal.2d 697, 704-5 (1944); Leet v. Union Pac. R.R. Co., 25 Cal.2d 605, 612 (1944); Miller v. Municipal Court, 22 Cal.2d 818, 848, 850 (1943). Thus, for example, in Mondou v. New York, New Haven & Hartford R.R. Co., supra, in the course of reversing a decision of the Connecticut Supreme Court that the Federal Employers' Liability Act was unenforceable on "public policy" grounds in the courts of that state, Justice Van Devanter, stated for a unanimous United States Supreme Court (id., 223 U.S. at 57; emphasis added):

"When Congress, in the exertion of the power confided in it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in Claflin

v. Houseman, 93 U.S. 130, 136, 137, 23 L.Ed. 833, 838, 839: '... The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state. ...'"

This passage from the Mondou opinion was later quoted and relied upon by the Supreme Court of this state in Miller v. Municipal Court, supra, where the Court issued a writ of mandate to compel the respondent municipal court to entertain an action brought under the Federal Emergency Price Control Act notwithstanding the contention that the Act was "penal" in nature and hence unenforceable in the California state courts. Id., 22 Cal.2d at 848. Besides quoting from the opinion in Mondou, the California Supreme Court justified its issuance of the writ in that case by the additional observation that "[t]he legislation of Congress is a portion of the law of each State" and is accordingly entitled to enforcement as such in the courts of California. Id. at 850.

The basic principle enunciated in these opinions has been specifically invoked in at least two decisions to sustain the enforcement of the Federal Arbitration Act in the face of a contention that its enforcement was precluded by a clause in the arbitration agreement expressly stating that it was to be applied in accordance with the law of a particular state. Thus, in Mamlin v. Susan Thomas, Inc., supra, the Texas Court of Civil Appeals held that the Federal Arbitration Act governed the issue of the arbitrability of the parties' dispute despite a provision in their agreement requiring that this issue be resolved "in accordance with the then current arbitration rules of the American Arbitration Association and the laws of the State of New York." Id., 490 S.W.2d at 636. In support of its holding to this effect, the court stated simply that "[t]he Federal Arbitration Act is the law of New York and also the law of Texas with respect to any 'contract evidencing a transaction involving commerce,'" and that application of its terms to the instant dispute was accord-

ingly consistent with the choice-of-law provision of the parties' agreement. Id., 490 S.W.2d at 637. This passage from the Mamlin opinion was subsequently quoted and relied upon as one of several alternative grounds for reaching the same result in Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976), where the court held that arbitrability of the parties' dispute should be determined under the Federal Arbitration Act despite the presence in their agreement of a provision requiring that application of the agreement "shall be determined and governed by the law of the State of Illinois." Id., 541 F.2d at 1266, 1270. Thus, these decisions and the basic principle of federalism upon which they rely provide yet a second, independently sufficient reason why the choice-of-law clause in the agreement at issue in this case cannot be deemed to preclude the application of the Federal Arbitration Act to resolve the present controversy.

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C. The Legal Invalidity of a Contrary Interpretation

Finally, a third alternative justification for this conclusion is furnished by a substantial number of decisions which hold that the parties to an arbitration agreement involving interstate commerce are not free to exempt themselves from the coverage of the Federal Arbitration Act by designating some other body of law to govern their agreement, and that any choice-of-law clause that attempts to accomplish that result is to that extent invalid. The leading decision to this effect is the ruling of the federal court of appeals in Commonwealth Edison Co. v. Gulf Oil Corp., supra, *** The holding in Commonwealth Edison has been followed in several subsequent decisions which similarly hold that the Federal Arbitration Act effectively invalidates any choice-of-law clause in an arbitration agreement that purports to preclude the application of federal law to the agreement, particularly where this would have the effect of preventing the enforcement of a promise to

arbitrate that would have been enforceable under the federal Act. E.g., Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., supra, 797 F.2d at 243-44; Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., supra, 625 F.2d at 25n.8; Paul Allison, Inc. v. Minikin Storage of Omaha, Inc., supra, 486 F.Supp. at 3; Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.App. 1982). Thus, these decisions establish that the choice-of-law provision at issue in this case would not be effective to prevent the application of the Federal Arbitration Act to this dispute even if it had provided in so many words, which it clearly does not, that California law should govern the resolution of the dispute to the complete exclusion of the federal Act.

D. The Two Decisions Espousing a Minority View

The foregoing discussion demonstrates that there are at least a dozen decisions holding, on one rationale or another, that the type of choice-of-law clause that appears in the

parties' contract in this case cannot be deemed to foreclose the application of the Federal Arbitration Act to determine the arbitrability of a dispute arising under the contract.

Arrayed against this overwhelming body of authority are two decisions which have reached a contrary result, holding that such a choice-of-law clause is indeed effective to preclude reliance on the Act to resolve the issue of arbitrability. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 140 Cal.App.3d 251 (1983); Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671 (La. 1978).

One of these decisions, a ruling of the California Court of Appeal for the Fourth District, was expressly relied upon by the trial court to support its refusal to follow the Federal Arbitration Act in adjudicating the present controversy (JA 252). Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra.

Although the holdings in these two cases are thus clearly distinguishable, Volt submits,

nevertheless, that the more correct and forthright disposition of these decisions would be simply to acknowledge that both of them were wrongly decided with respect to the issue presented here. For reasons already reviewed at length above, a clause in a contract which merely specifies that the contract is to be governed by the law of the place of performance simply cannot be interpreted, either literally or consistently with the character of our federal system, to preclude the application of otherwise applicable federal statutes. To the extent these decisions adopt such an interpretation of this type of clause, they are wrong and should not be followed by this court.

E. Conclusion

The discussion in this section has demonstrated that, for at least three compelling reasons, the choice-of-law provision in the contract between Volt and Stanford presents no obstacle to the application of the Federal Arbitration Act to this case. Indeed, it has been shown that, if anything, the application of the Act in this context is

affirmatively required by the terms of that provision. Since it has also been demonstrated, in the preceding section, that the Federal Arbitration Act, if applicable to this case, would mandate immediate arbitration of the parties' current dispute and prohibit any stay of the arbitration pending the outcome of Stanford's law suit, it follows that the trial court erred in ordering such a stay and in denying Volt's motion to compel Stanford to proceed with the arbitration.

III. In Any Event, Even if This Controversy Were to Be Resolved in Accordance with State Law, Reversal of the Superior Court's Order Would Still Be Required Because C.C.P. §1281.2(c) Does Not Authorize the Type of Stay Order Entered by the Court in the Circumstances Presented Here.

CONCLUSION

The foregoing discussion has demonstrated that the Federal Arbitration Act governs the issue of arbitrability of the interstate contract dispute that is at issue in this case, and that the superior court's ruling to the contrary was therefore erroneous. It has also

been demonstrated that the Act specifically forbids a trial court from refusing to order arbitration on the ground that non-arbitrable claims arising out of the same transaction have been asserted against third parties in a pending law suit, and that the superior court therefore further erred in refusing to order arbitration on that ground in this case. Finally, it has been shown that, even if the case were to be resolved under state law, the superior court's order would still be improper because a reasonable application of the terms of C.C.P. §1281.2(c) would not authorize such an order in the circumstances that are presented here. For all of these reasons, it is submitted that the order of the superior court denying Volt's petition to compel arbitration and granting Stanford's motion to stay the arbitration should be reversed. The mandate accompanying the reversal should include a direction to the superior court to enter a new order requiring the immediate arbitration of Volt's claim against Stanford and staying the prosecution of Stanford's

pending action against Volt until that
arbitration has been completed.

Dated: January 13, 1987

Respectfully submitted,

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APPENDIX G -

EXCERPTS FROM APPELLANT'S
PETITION FOR REVIEW IN
THE CALIFORNIA SUPREME COURT

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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BOARD OF TRUSTEES)	
OF LELAND STANFORD)	
JUNIOR UNIVERSITY,)	
Plaintiff-Respondent,	)	No. S003107
)	
vs.	)	Court of Appeal
	)	No. H002634
VOLT INFORMATION)	
SCIENCES, INC.,)	
Defendant-Appellant.)	

Appeal from the Superior Court
for the County of Santa Clara
Honorable Charles Gordon, Judge

PETITION FOR REVIEW

TABLE OF CONTENTS

ISSUES PRESENTED	1
INTRODUCTORY SUMMARY	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING REVIEW	7
I. There Is No Serious Dispute That, Unless the Choice-of-Law Clause Were Found to Require a Different Result, Federal Law Would Govern the Disposition of This Case and Would Dictate That Volt's Petition to Compel Arbitration Should Be Granted.	7
II. The Decision of the Court of Appeal on the Effect of the Choice-of-Law Clause Is in Clear Conflict with the Decisions of Other California Courts of Appeal, as Well as the Virtually Unanimous Decisions of the Courts in Other Jurisdictions.	11
A. The Decision of the First District in the Liddington Case	11
B. The Decision of the Fourth District in the Garden Grove Case	14
C. The Decision of the Second District in the Ford Case	17
D. The Numerous and Virtually Unanimous Contrary Decisions of the Courts of Other Jurisdictions	18
III. The Issue Presented Here Is of Substantial Importance, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability	21

of Arbitration Agreements in Precisely Those Categories of Transactions in Which Arbitration Is Most Commonly Utilized as a Means of Settling Disputes.

IV. The Opinion of the Court of Appeal Reflects a Wholly Unsatisfactory Resolution of the Question Presented Here, in Both Its General Aspect and in the Context of the Particular Facts Presented by This Case.	23
A. The Language of the Agreement	24
B. The Intent of the Parties	26
C. The Implications of Federalism	28
V. If the Court Grants This Petition, It Should Also Entertain Volt's Alternative Argument That the Provisions of C.C.P. §1281.2(c) Should Not Be Construed to Authorize a Party's Avoidance of Its Duty to Arbitrate in the Circumstances Presented by This Case.	28
CONCLUSION	29

ISSUES PRESENTED

The principal issue which is presented by this case, and which evoked divided opinions from the members of the panel that heard the case in the court of appeal, is whether a choice-of-law clause in a construction contract specifying that the contract "shall be governed by the law of the place where the project is located" effectively precludes reliance on the Federal Arbitration Act to enforce an agreement to arbitrate any dispute arising under the contract, and thus authorizes a trial court to deny such enforcement pursuant to a provision of state law that directly conflicts with the otherwise applicable mandate of the federal Act.

A secondary issue which the court may be required to address in the event it should grant this petition is whether §1281.2(c) of the Code of Civil Procedure, which empowers the superior courts to refuse enforcement of an arbitration agreement when one party to the agreement is also a party to related litigation with third persons, may properly be invoked to

deny such enforcement where the party resisting arbitration has himself initiated the litigation with such third persons in direct response to the demand for arbitration.

INTRODUCTORY SUMMARY

This case presents the single most important unresolved issue concerning the relationship between the dictates of the Federal Arbitration Act and the laws of the several states governing the enforcement of arbitration agreements. That issue is whether and under what circumstances an agreement to arbitrate that is otherwise clearly enforceable under the federal Act may nevertheless be denied enforcement pursuant to a conflicting state statute on the ground that a choice-of-law clause in the parties' contract precludes reliance on the federal Act. This question has never been addressed by either this court or the United States Supreme Court. Meanwhile, however, the issue has continued to arise with great frequency and has evoked sharply divergent opinions in the other state courts and lower federal courts. This divergence of

opinion has particularly manifested itself in the decisions of the courts of appeal of this state, which have reached entirely disparate conclusions regarding the proper disposition of this issue in the four cases arising in California in which the question has so far been presented. The divided opinions of the justices of the court of appeal in this very case furnish a telling illustration of the serious disagreement over this issue which currently exists among the judiciary. There is thus little doubt that the issue is in grave need of definitive resolution by this court. As such, it comprises a virtual paradigm of the sort of issue for which review by the court is "necessary to secure uniformity of decision or the settlement of important questions of law" within the meaning of the provisions of Rule 29(a) of the Rules of Court that define the conditions under which a petition for review should be granted. The remainder of this petition, following the Statement of the Case, will be devoted to a more detailed demonstration of this conclusion.

STATEMENT OF THE CASE

REASONS FOR GRANTING REVIEW

- I. There Is No Serious Dispute That, Unless the Choice-of-Law Clause Were Found to Require a Different Result, Federal Law Would Govern the Disposition of This Case and Would Dictate That Volt's Petition to Compel Arbitration Should Be Granted.

As stated above, the major issue presented by this case is whether the application of the Federal Arbitration Act to this controversy is foreclosed by the choice-of-law clause in the parties' agreement. Most of this petition will consist of a discussion of the general importance of this issue and a description of the conflict over the issue that has arisen among the courts of appeal. Preliminarily, however, it is useful to place the issue in perspective within the context of this particular case by demonstrating that it is indeed dispositive of the outcome of this lawsuit. This demonstration will involve nothing more than the brief statement of certain basic and uncontroversial propositions regarding the general applicability of the

federal Act. Taken together, these propositions establish that, unless the choice-of-law clause were found to dictate a different result, the provisions of the federal Act would govern this proceeding and would require that Volt's petition to compel arbitration be granted.

First, it is by now well settled that the Federal Arbitration Act creates a comprehensive body of substantive law governing all arbitrations arising out of transactions affecting interstate commerce, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Perry v. Thomas, ___ U.S. ___, 107 S.Ct. 2520, 2525 (1987); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24, 26 (1983); Liddington v. The Energy Group, Inc., 192 Cal.App.3d 1520, 1526 (1987); Tonetti v. Shirley, 178 Cal.App.3d 632, 637-38 (1985). As the United States Supreme Court stated in the

often quoted passage from its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, the Act "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act ... [which] governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24.

Secondly, it is equally clear that if the federal Act were to be applied to this case, its application would necessarily require reversal of the order of the superior court denying Volt's petition to compel arbitration. As noted earlier, the sole basis for that order and for the court of appeal's decision affirming the order was the provision of C.C.P. §1281.2(c) that authorizes denial of a petition to compel arbitration where related non-arbitrable claims have been asserted against third parties in a pending lawsuit. The Federal Arbitration Act contains no counterpart provision permitting avoidance of an

arbitration agreement in these circumstances, and the decisions of the state and federal courts applying the Act have therefore unanimously held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying or staying the enforcement of such an agreement. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 19-20; C.Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975); Liddington v. The Energy Group, supra, 192 Cal.App.3d at 1528; Ford v. Shearson Lehman Amer. Express, Inc., supra, 180 Cal.App.3d at 1017; R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127, 131 (Kan.App. 1982); Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 1977). Cf. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-21 (1985). If applied in this case, this settled federal rule would clearly preempt the conflicting prescriptions of C.C.P. §1281.2(c) and eliminate the only legal basis for the

order denying Volt's petition. Liddington v. The Energy Group, Inc., supra, 192 Cal.App.3d at 1528. As the court of appeal itself acknowledged, it is thus "apparent that were the federal rules to apply, Volt's petition to compel arbitration would have to be granted" (Majority Opinion, p. 3).

Finally, there is no question that, unless otherwise dictated by the choice-of-law clause, federal law would indeed govern the disposition of this case, because the arbitration agreement at issue here clearly "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the provisions of the federal Act defining the scope of its coverage. 9 U.S.C. §§1-2. Volt established by uncontradicted evidence in the trial court that a large proportion of its manpower and equipment was transferred or shipped to California for use on the Stanford project, and that the project was administered from Volt's offices outside California (JA 207-8). Under the standards enunciated in the case law on this issue, these facts clearly

establish a sufficient nexus with inter- state commerce to bring this transaction well within the purview of the federal Act. Prima Paint Co. v. Flood & Conklin, 388 U.S. 395, 401 (1967); Mesa Ltd. P'ship. v. Intrastate Gas Corp., 797 F.2d 238, 243 (5th Cir. 1986); In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. 460 U.S. 1 (1983); Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844, 848-51 (Ind.App. 1975); Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650-52; Allison v. Medicab Intl., Inc., 597 P.2d 380, 382 (Wash. 1979).

All of these settled propositions were accepted by both the court of appeal and the trial court, and in fact have never been seriously contested by Stanford itself.* It follows that the only remaining issue standing

* This description of Stanford's position must be qualified in one minor respect. In its brief in the court of appeal, Stanford attempted, somewhat obliquely, to cast some doubt on the general applicability of the remedial provisions of the federal Act in state courts by pointing to an admittedly rather puzzling footnote in the opinion of the United States Supreme Court in Southland (continued)

in the way of a determination that Volt's petition to compel arbitration pursuant to the federal Act must be granted, and that the

(footnote contd.) Corp. v. Keating, supra, where the court, in the course of responding to one of the points made by the dissenting justice, had suggested that certain sections of the Act specifying the methods for enforcing arbitration agreements might not be specifically applicable in state trial courts. (Stanford's Brief, pp. 12-13, citing Southland, supra, 465 U.S. at 16n.10). In its reply brief, Volt responded to this argument by demonstrating at considerable length that the actual holdings of the Supreme Court, including the holding in Southland itself, as well as the decisions of many state and lower federal courts on the issue, had clearly established that the remedies and procedures prescribed by the federal Act, whether by virtue of these particular sections or otherwise, were clearly enforceable in state courts as well as in federal courts (Volt's Reply Brief, pp. 15-34). This entire debate was ultimately mooted by another decision of the Supreme Court handed down after the filing of the briefs but before the oral argument in the court of appeal. In that decision, Perry v. Thomas, supra, the court squarely held, by specifically enforcing a petition to compel arbitration brought in a California superior court under the very sections of the Act referred to in the enigmatic Southland footnote, that these procedural provisions of the federal Act were indeed fully applicable in state courts. Id., 107 S.Ct. at 2523 and n.1. As the court of appeal apparently assumed in its opinion in this case, this intervening decision of the Supreme Court has effectively eliminated any serious possibility of further controversy over this point.

contrary order of the trial court must be reversed, is the question whether the application of federal law to this case is foreclosed by the clause in the parties' agreement specifying that its enforcement "shall be governed by the law of the place where the project is located." Having thus established that this issue is indeed dispositive of this case, Volt will now turn to a demonstration that the issue clearly warrants plenary review by this court, because of both its inherent importance and the conflict it has engendered among the courts of appeal of this state.

II. The Decision of the Court of Appeal on the Effect of the Choice-of-Law Clause Is in Clear Conflict with the Decisions of Other California Courts of Appeal, as Well as the Virtually Unanimous Decisions of the Courts in Other Jurisdictions.

A. The Decision of the First District in the Liddington Case

In holding that the choice-of-law clause in the Volt-Stanford contract precluded reliance on the federal Act and thus permitted the trial court to deny Volt's petition to compel arbitration pursuant to C.C.P. §1281.2(c), the

court of appeal in this case placed itself in direct conflict with the decision rendered only three months earlier by the Court of Appeal for the First Appellate District in Liddington v. The Energy Group, Inc., supra, 192 Cal.App.3d 1520. In the Liddington case, the contract between the parties contained both an arbitration clause and a choice-of-law clause specifying that the contract would be "construed under the laws of California." Id., 192 Cal.App.3d at 1524. *** The party resisting arbitration contended *** that application of the federal Act was *** precluded by the clause of the parties' agreement requiring that it be construed in accordance with California law. Id. *** The trial court accepted this latter contention and accordingly entered an order pursuant to C.C.P. §1281.2(c) rejecting the petition to compel arbitration and staying the arbitration pending the outcome of the lawsuit.

The court of appeal reversed this ruling. In its opinion, the court held that, not-

withstanding the clause of the contract requiring its interpretation in accordance with California law, this choice-of-law provision could not alter the conclusion, otherwise mandated by the decisions of the United States Supreme Court, that "Code of Civil Procedure section 1281.2 is preempted to the extent it is used to stay arbitration of a dispute governed by the FAA." Id. at 1525. The court accordingly remanded the case with a direction that the stay of the arbitration should be dissolved, and that the arbitration should be allowed to proceed pursuant to the terms of the federal Act. Id. at 1528-29.

B. The Decision of the Fourth District in the Garden Grove Case

The third California decision that has addressed the issue of the effect of a choice-of-law clause on the application of the Federal Arbitration Act is the decision of the Court of Appeal for the Fourth District in Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 140 Cal.App.3d 251 (1983). That decision

attempts to steer something of a middle course between the Liddington decision and the decision of the court of appeal in this case, and consequently ends up following an approach to this issue that is at odds in various respects with both of these other decisions.

The Garden Grove case, like this one, involved a construction contract containing an arbitration clause, a claim by the contractor against the owner, and a claim for indemnity by the owner against the project architect and construction manager. Unlike the contract at issue in this case, however, the contract between the owner and the contractor expressly provided that the owner would be excused from his duty to arbitrate in the event of a dispute with another participant in the project who could not be compelled to join in the arbitration; and a corresponding clause in the owner-architect agreement provided that the architect could not be compelled to join in any arbitration involving the contractor or any other third party. The contract between the owner and the contractor also contained a

clause which provided, according to the court's description, that the contract would be governed by "the law of the construction site." Id. at 259.

In the course of its opinion, the court considered the question whether federal or state law should govern the disposition of the case in the light of the choice-of-law clause in the owner-contractor agreement. The court interpreted the language of the clause as a reference to California law, and opined that "[i]n the face of such a choice of laws provision, California law applies unless preempted by the FAA." Id. at 262 (emphasis added). The court went on to conclude that the provisions of C.C.P. §1281.3 requiring the consolidation of related arbitrations were not in fact preempted by the federal Act because, in its view, there was "no conflict between ... this policy [of consolidating arbitrations] ... and the federal scheme of regulation embodied in the FAA." Id.

On the one hand, this decision is

consistent with the decision of the court of appeal in this case - and correspondingly inconsistent with the Liddington decision - to the extent that it construes the choice-of-law clause in the parties' agreement as an exclusive reference to California law and holds that such a contractual provision may effectively preclude the application of the Federal Arbitration Act in appropriate circumstances. On the other hand, the decision is wholly inconsistent with the decision in this case to the extent that it declares that state law may only be applied pursuant to a choice-of-law clause "unless preempted by the FAA," and that federal law would have to be applied even in the face of such a contractual stipulation in the event of a direct conflict between the dictates of the federal Act and the prescriptions of state law.

C. The Decision of the Second District in the Ford Case

The issue of the effect of a choice-of-law clause on federal preemption was also presented

by the facts, though not explicitly argued by the parties or addressed by the court, in the 1986 decision of the Court of Appeal for the Second District in Ford v. Shearson, Lehman Amer. Express, Inc., supra, 180 Cal.App.3d 1011. The parties' contract in that case provided for arbitration "pursuant to the arbitration laws of the State of New York." Id., 180 Cal.App.3d at 1016. The parties apparently chose to ignore this provision in urging that the issue before the court - the arbitrability of a claim of fraud in the inducement - be resolved in exclusive accordance with federal law. The court expressly approved this approach, observing in this regard that "[t]he parties are correct in urging that federal law, namely the Federal Arbitration Act (9 U.S.C.A. §2), is applicable since the agreements in question involve securities transactions in interstate commerce." Id. at 1017. The court went on to adjudicate the fraud issue pursuant to federal law, although it also referred in passing to certain decisions of the California and New

York courts that it viewed as consistent with the federal rule. Id. at 1018-24.

D. The Numerous and Virtually Unanimous Contrary Decisions of the Courts of Other Jurisdictions

Besides departing from the holdings of the other courts of appeal in this state, the decision of the court of appeal on the issue presented here conflicts with the virtually unanimous decisions addressing the same issue in other jurisdictions. With a single exception, these decisions have uniformly held that a choice-of-law clause in an arbitration agreement of the kind involved in this case is ineffective to displace the otherwise applicable provisions of the Federal Arbitration Act.

The courts reaching this result have relied on a variety of different rationales to justify their decisions. Thus, in some of these cases involving choice-of-law clauses identical to the one at issue here, the courts have simply interpreted the language of the clause as encompassing federal as well as state law,

observing in this regard that the phrase "'the law of the place where the project is located' ... would certainly include all applicable law, including the Federal Arbitration Act."

Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650n.1. Accord Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22, 25n.8 (5th Cir. 1980); See Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1, 2-4 and n.1 (D.Neb. 1979). A second group of decisions have adopted the alternative rationale espoused by the opinion of the dissenting justice in this case - namely, that any choice-of-law provision designating the laws of a state of the United States must be deemed to encompass federal as well as state law because it is a familiar tenet of our federal system that the laws of every state incorporate and include the laws of the United States. Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1270 (7th Cir. 1976); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex.Civ.App. 1973). Thirdly, a number of courts have gone so far as to hold that any

choice-of-law clause that purports to preclude the application of the federal Act is simply invalid to the extent that it would have the effect of rendering the arbitration agreement unenforceable in the case before the court and of thus frustrating the federal policy favoring arbitration. Mesa Ltd. P'ship. v. Louisiana Intrastate Gas Corp., supra, 797 F.2d at 243-44; Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3-4; Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.App. 1982).

Finally, several decisions, like the decision of the California Court of Appeal in Ford v. Shearson, Lehman Amer. Express Co., supra, have simply proceeded to apply the Federal Arbitration Act in the face of a contractual provision selecting state law as the governing law without explicitly stating any particular rationale for refusing to accord preclusive effect to such a choice-of-law provision.

E.g., LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Co., 791 F.2d 1331,

1338-39 (9th Cir. 1986); Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997-98 (8th Cir. 1972); Hilti, Inc. v. Oldach, supra, 392 F.2d at 370, 371n.6; Pinkis v. Network Cinema Corp., 512 P.2d 751, 753, 756-57 (Wash.App. 1973).

There are thus a total of at least twelve decisions in other jurisdictions that have held, on one ground or another, that a choice-of-law provision of the kind involved here is ineffective to preclude reliance on the Federal Arbitration Act as the source of the law governing the enforcement of an arbitration agreement. Arrayed against this substantial body of authority is a single decision, the ruling of the Louisiana Supreme Court in Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671 (La. 1978), which is the only decision outside California ever to hold that such a choice-of-law provision may indeed exclude the application of the federal Act. I must therefore be concluded that the decision of the court of appeal in the instant case, besides contravening other decisions of the courts of appeal in this state, also runs

counter to the overwhelming majority of the decisions on the same issue in other jurisdictions.

III. The Issue Presented Here Is of Substantial Importance, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability of Arbitration Agreements in Precisely Those Categories of Transactions in Which Arbitration Is Most Commonly Used as a Means of Settling Disputes.

IV. The Opinion of the Court of Appeal Reflects a Wholly Unsatisfactory Resolution of the Question Presented Here, in Both Its General Aspect and in the Context of the Particular Facts Presented by This Case.

Notwithstanding the importance of the issue presented here and the existing conflict among the views of the courts of appeal on this issue, Volt recognizes that this court might nevertheless be disinclined to address the issue if it should appear that the opinion of the court of appeal reflected such a persuasive resolution of the problem that its decision might well be accepted as authoritative in all future cases raising the same issue. Alternatively, this court might harbor the same

disinclination to reexamine the matter if it should appear that this case involved special facts that would support the court of appeal's decision without regard to the correctness of its resolution of the general question of the effect of choice-of-law clauses on the application of the Federal Arbitration Act. In this final section of this petition, Volt will demonstrate, by undertaking a particular analysis of the reasoning of the court of appeal, that neither of these circumstances is present here, and that in fact the court of appeal's opinion reflects a wholly unsatisfactory resolution of this question in both its general aspect and in the context of the facts of this particular case.

A. The Language of the Agreement

B. The Intent of the Parties

C. The Implications of Federalism

Finally, the majority opinion of the court of appeal entirely fails to take account of the

serious obstacle raised by the opinion of the dissenting justice to the conclusion reached by the court regarding the preclusive effect of the choice-of-law clause. As Justice Cappacioli demonstrates in his dissent, even if one accepts the majority's view that this contractual provision requires the resolution of this controversy in accordance with California state law, this conclusion does not preclude the application of the Federal Arbitration Act, because, in the words of this court, "[t]he legislation of Congress is a portion of the law of each State" by virtue of the mandate of the Supremacy Clause of the federal Constitution, and is therefore just as much the law of California as any of the statutes enacted by its legislature. Miller v. Municipal Court 22 Cal.2d 818, 848, 850 (1943). Volt cannot improve upon Justice Cappacioli's lucid presentation of this point, and will accordingly content itself with simply observing that this consideration provides a final persuasive reason why the majority opinion of the court of appeal cannot be

accepted as an adequate resolution of the important issue that is presented by this case.

V. If the Court Grants This Petition, It should Also Entertain Volt's Alternative Argument That the Provisions of C.C.P. §1281.2(c) Should Not Be Construed to Authorize a Party's Avoidance of Its Duty to Arbitrate in the Circumstances Presented by This Case.

CONCLUSION

Volt has demonstrated in this petition that the decisions of the appellate courts on the principal issue presented by this case are in serious conflict, that this issue is of determinative significance with respect to the enforceability of a great many arbitration agreements, and that the issue has not been satisfactorily resolved by the opinion of the court of appeal. This court's examination of the issue is therefore clearly "necessary to secure uniformity of decision or the settlement of important questions of law" within the meaning of Rule 29(a) of the Rules of Court.

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For this reason, Volt respectfully submits that
this petition should be granted.

Dated: November 12, 1987

Respectfully submitted,

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APPENDIX H -

RELEVANT STATUTES AND
CONSTITUTIONAL PROVISIONS

SUPREMACY CLAUSE OF
THE UNITED STATES CONSTITUTION
(U.S. Const., Art. VI, cl. 2)

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

FEDERAL ARBITRATION ACT, §§1-4
(9 U.S.C. §§1-4)

Section 1. "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished to vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such

Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.

Section 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration

under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

Section 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of a controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service

thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such

demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CALIFORNIA ARBITRATION ACT, §1281.2(c)
(Cal.Code Civ.Proc. §1281.2(c))

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it

determines that:

...

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

...

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision

(c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.